SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 11.

NATHANIEL HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR THE PETITIONER.

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INDEX.

	Page
Argument	1
Conclusion	4

Cases Cited.

Morrison v. California, 291 U. S. 82, 88-91	2
Morissette v. United States, 342 U. S. 246, 275	2
Tot v. United States, 319 U. S. 463	3

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ARGUMENT.

The government contends that "the decision in **Gore** is based on the assumption that all that the government proved was one act of sale with the possession involved in that sale." Govt. Br., p. 13. But there is nothing in the opinion to warrant that assumption. While the **Gore** case decided the issue whether an indictment arising out of a single sales transaction could be the basis of multiple punishment, questions relating to the evidence were not before the Court. Furthermore, if the evidence in that

case is examined, it will be found that there was no need to resort to any statutory presumption to sustain the conviction. The evidence showed that the defendant after selling to an undercover agent "delivered the narcotics to the agent in an unstamped package without use of any order form." Govt. Br., Gore v. United States, p. 38. The proof thus indicated both a sale without stamps and a transportation of illegally imported narcotics. The presumption statutes were not used in lieu of evidence of additional facts distinguishing the two offenses. **Gore** is simply a case where in the course of one transaction, the evidence showed that the defendant violated several statutory prohibitions.

While reason may support the statutory presumptions which require the accused to explain his possession, cf. **Morrison v. California,** 291 U. S. 82, 88-91, considerations of fairness do not necessitate the imposition of double punishment if he fails to supply such an explanation. For example, while it may be reasonable to assume that a possessor is either a purchaser or a person who has facilitated the concealment of the drug, it is not reasonable to assume that he is both. The presumption of innocence which the law gives to the accused extends to every element of the crime. **Morissette v. United States,** 342 U. S. 246, 275. A possessor need not be a purchaser. A possessor need not facilitate the concealment of the drug. Indeed the statutes so recognize by making proof of possession sufficient evidence for conviction of sale, purchase, transportation and concealment. By these presumptions Congress in effect has said that if the law enforcement officials are in doubt or if the evidence which may be adduced is doubtful as to what particular wrong a defendant has committed in connection with the narcotics laws, the accused may be punished unless he convinces a jury that he is not guilty of any wrongful conduct. Its purpose is to punish wrongdoing where there is no specific

evidence to show which requirement was violated or which act was committed.

Moreover, the government has presented no reason in principle or in legislative history which warrants double punishment upon proof of the single fact of possession. It simply relies on the statutory presumptions which permit multiple offenses to be presumed from that fact and which presume the existence of a fact in one offense not essential to the other. An intent of Congress to permit separate punishment for violation of each narcotic enactment arising out of one act of sale does not demonstrate an intent to allow multiple punishment in cases which rely solely on the statutory presumptions which it created. It is one thing to authorize multiple punishment from proof of a single transaction such as a sale or purchase which is specifically forbidden when made in defiance of specific regulatory controls. It is quite a different thing to permit such punishment from proof of a single fact, possession, which by statutory presumption merely constitutes sufficient evidence to prove a transaction to which the narcotic laws are applicable. Congress has not said that possession in defiance of the statutory commands is a crime. Permitting multiple punishment upon the presumptions raises possession to the status of a sale or purchase and for all practical purposes makes it a component part of each narcotic crime.

The government contends that "the instructions were fairly in accord with the mandate of Congress." Govt. Br., p. 22. If this contention is correct, it illustrates the fact that to allow double punishment in this case is to place different labels on the same thing.

Congressional power to facilitate convictions by substituting presumptions for proof is not without limitation. **Tot v. United States**, 319 U. S. 463. It is a drastic power based upon the need to shift the burden of proof to the

accused in order to secure a conviction where there are difficult problems of proof. There is no reason to use this power to obtain multiple punishment. It would seem that when Congress chooses to substitute a presumption for proof and makes the same presumption applicable to two statutes, the rule of lenity should be especially applicable.

CONCLUSION.

For the reasons set out above and for those set out in petitioner's original brief, the judgment of the court below should be reversed.

Respectfully submitted,

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